

New Rice Recipes: The Legitimization of Continued Overthrow

By Chris K. Iijima¹

I have two sons. They are alike in many ways. They have the bright eyes and the uncensored laughs of children who are lucky enough to have still the innocence that should be the birthright of all children. I watch them and notice how the younger one emulates his older brother's mannerisms; how their dark hair falls similarly; how bright and kind they both are; how their fears and questions often reflect our family's circumstances.

And yet, of course, I treasure their differences. One is pessimistic, the other optimistic. One is cautious, the other often heedless. One is broad, the other slender. It seems to me that it is in their differences that I best know them. And my love for them is enriched by my appreciation of how they are similar and yet distinct.

And thus, it occurs to me that since both knowledge and caring are intrinsically connected to appreciating similarity and difference, it must follow that the failure to appreciate them is a sure signal of either indifference or hostility – or both.

I've written about *Rice v. Cayetano* in law journals,² magazines,³

¹ Associate Professor of Law, William S. Richardson School of Law, University of Hawai'i-Manoa. Thanks go to Ahahui o Hawai'i and members Shirley Garcia and Crystal Glendon, among others, for being the ones who organized the *Rice* symposium at the law school, and particularly to Le'a Kanehe, a former student and present colleague, for her suggestions, encouragement, and her steadfastness in making sure that this symposium actually happened, to the ASIAN-PACIFIC LAW & POLICY JOURNAL (APLPJ) for their willingness to publish the proceedings and for inviting my participation, and to Heidi Guth, my APLPJ editor, for her help and encouragement.

² Chris K. Iijima, *Race Over Rice: Binary Analytical Boxes and a Twenty-First Century Endorsement of Nineteenth Century Imperialism in Rice v. Cayetano*, 53 RUTGERS L. REV. 91 (2000).

³ Eric K. Yamamoto & Chris Iijima, *The Colonizer's Story: The Supreme Court Violates Native Hawaiian Sovereignty -- Again*, 3 COLORLINES MAG. 6 (2000).

and newspapers,⁴ not only because it represents a distortion of the condition of Native Hawaiians and their justice claims, but also because it is a stark reminder that because of this Supreme Court's inability and unwillingness to distinguish the different claims of the Native Hawaiian people and people of color in general, the Court does not recognize, value, nor understand either.⁵ I wrote that the harms of the loss of Hawaiian land, culture, and nationhood are simply not shared equally by all who live in Hawai'i.⁶ Those harms impact Native Hawaiians. Thus, I concluded that the remedy for the loss of sovereignty is different from providing equal opportunity for racial minorities. The Court in *Rice* held that the Fifteenth Amendment, which outlawed racial discrimination in voting, forbid voting by Hawaiians only in elections for the Office of Hawaiian Affairs ("OHA"), which is charged by statute and state constitution with administering programs benefiting and affecting Native Hawaiians. However, even putting aside the argument that the Court entirely ignored the historical context of the Fifteenth Amendment in its application to the OHA voting scheme, and putting aside the completely reasonable notion that an entity administering programs for Native Hawaiians should be controlled by Native Hawaiians, the Court's construction of the intent of the Fourteenth and Fifteenth Amendment was without any attempt to reconcile the purpose of the amendments with the claims of the Native Hawaiian people.

These amendments were intended to create opportunities for excluded minorities to participate equally within the American system – to “level the playing field” for former slaves, and later other racial minorities, struggling to achieve greater inclusion within American society. This is precisely the opposite goal of the claims of Native Hawaiians. Their claims involve a desire for independence from the American political system. Thus, the logic and inherent necessity of separation is at the very heart of Native Hawaiian justice claims. The Court's refusal to understand the two distinct and fundamentally different claims of indigenous peoples and people of color guarantees that it will do

⁴ Chris Iijima, *The Damage Done*, HONOLULU WKLY., Nov. 15-21, 2000, at 9.

⁵ It is important to establish that my past writings on this subject do not and should not be construed as “speaking for” the Kanaka Maoli (Hawaiian people). They eloquently speak for themselves. My writings about Hawaiian issues solely represent a non-Hawaiian in the process of “speaking out” about the injustices he sees taking place.

⁶ See notes 2-4 *supra*.

no justice to either.

This is because the redress for the loss of sovereignty is very different from affirmative action. Affirmative action was conceived to address the inequality of opportunity imposed upon racial minorities.⁷ While assumptions about racial inferiority are related both to colonization as well as domestic racial discrimination, the distinction between racial discrimination and the loss of sovereignty may be illustrated by looking at the racial hierarchy characterizing the sugar plantation system in Hawai'i. On the plantations, essentially the skilled and supervisory positions were restricted to Caucasians, whereas the laborers were solely non-Caucasians. It is this kind of unequal opportunity and treatment that the Fourteenth Amendment contemplates. It is a kind of racial oppression that affected (and still affects) Hawaiians, Filipinos, Pacific Islanders, and African Americans, among others.

But these kinds of discrimination claims differ from those that were at issue in *Rice*. Native Hawaiian harms are not solely rooted in the vestiges of the racially discriminatory plantation social structure. They are rooted in the forcible taking of their land and culture for the plantations themselves, among other reasons. In sum, not all people in Hawai'i have an equal claim to the immense harm caused by the dispossession of Hawai'i by the United States – even those harmed by a racially stratified plantation history. The claims for loss of Hawaiian land and culture are a claim of the indigenous Hawaiian people.⁸ This fundamental difference the Supreme Court in *Rice* never addressed, could not understand, and refused even to acknowledge.

However, the ultimate tragedy of the *Rice* decision is not only what it reveals about the racial and social ignorance of the Supreme Court.⁹ The tragedy is also to what the decision gives legitimacy. Despite the fact that since the illegal overthrow of the Hawaiian Kingdom and the United States government's concession that the "indigenous Hawaiian people

⁷ President Johnson's Exec. Order 11,246, 3 C.F.R. 339 (1964-1965 Comp.) (later amended in 1967 by Exec. Order 11,375, 3 C.F.R. 684 (1966-1970 Comp.) to include gender discrimination) prohibited racial discrimination in federal employment or by government contractors. In § 202 of the Order, government contracts were required to contain a provision whereby the contractor agreed to take "affirmative action" to ensure equal employment opportunity. See *Chrysler Corp. v. Brown*, 441 U.S. 281, 286 n.1 (1979).

⁸ For an extended discussion of these issues, see Iijima, *supra* note 2.

⁹ For a description of the racial implications of the Supreme Court's recitation of the facts in *Rice*, see Iijima, *supra* note 2.

never directly relinquished their claims to their inherent sovereignty,”¹⁰ the *Rice* decision has legitimized a legal discourse and strategy that continues to assault Hawaiian sovereignty claims through the perpetuation of “colorblind” ideology. This ideology simultaneously assaults the justice claims of people of color, and permits an unrelenting political attack on Native Hawaiian sovereignty in the guise of equal protection claims. *Rice* is both the product and facilitator of an underlying right-wing political agenda against the claims for racial equity by people of color. This can be clearly seen in the cases in Hawai‘i that were filed shortly after the *Rice* decision.

On October 3, 2000, a Caucasian Hawai‘i resident, Patrick Barrett, filed a complaint in Hawai‘i federal district court alleging that Article XII of the Hawai‘i State Constitution violated the Equal Protection Clause of the United States Constitution insofar as it created the Hawaiian Homes Commission (“HHC”) and the Office of Hawaiian Affairs (“OHA”), and protected Native Hawaiian gathering rights (“Article XII”).¹¹ His lawsuit followed another lawsuit filed earlier by another resident, John Carroll,¹² which similarly challenged the creation of OHA on equal protection

¹⁰ Apology Resolution of 1993, Pub.L. 03-150, 107 Stat. 1510-13 (1993).

¹¹ Carroll v. Nakatani, 188 F. Supp.2d 1219, 2001 U.S. Dist. LEXIS 22938 (D. Haw. 2001) [hereinafter Barrett].

The Hawaiian Homes Commission Act of 1920, ch. 42, 42 Stat. 108 (1921) in recognition of the economic, political, and psychological dislocation that the dispossession of Hawai‘i had caused to native Hawaiians, set aside 200,000 acres of former Kingdom lands for native Hawaiians.

The Admission Act of March 18, 1959 (“Admission Act”), Pub. L. No. 86-3, sec. 4, 73 Stat. 4 (1959) required, as a condition for statehood admission, that Hawai‘i accept responsibility for the Hawaiian Home Lands by adopting the Hawaiian Homes Commission Act as part of the state constitution. Section 5(f) of the Admission Act conveyed 1.2 million acres of lands to be held in trust for the following purposes: the support of public schools and educational institutions, the betterment of the conditions of native Hawaiians, for the development of farm and home ownership, for the making of public improvements, and for the provision of lands for public use.

Section 7 of Article XII reaffirms and protects “all rights, customarily and traditionally exercised for subsistence, cultural and religious purposes” by those of Native Hawaiian descent.

¹² Carroll is presently contending for the Republican nomination for the governorship of Hawai‘i, and was formerly an unsuccessful Republican candidate for U.S. Senator.

grounds.¹³

What is significant about both cases is that both were ultimately dismissed on standing grounds. The “merits” of both lawsuits were never adjudicated because both plaintiffs failed to make any initial showing that they were, in fact, injured. However, far from merely a “technical” defeat for these plaintiffs, these two decisions underscored the inherent and naked political motivation and intent of the two lawsuits – a political intent that is also reflected in the *Rice* decision as well.

In a carefully crafted decision, U.S. District Judge David Alan Ezra found as a matter of fact that neither Barrett nor Carroll had suffered any injury by the creation or existence of HHC, OHA, or Article XII.¹⁴ Indeed, Carroll acknowledged that he had never identified any particular OHA program in which he wanted to participate nor ever applied for any program.¹⁵ Barrett had never applied for a legitimate business loan from OHA, despite his allegation that he had, never demonstrated any indication that he was genuinely interested in starting a business, nor had he ever attempted to exercise gathering rights or express any interest in doing so.¹⁶ Judge Ezra observed that Carroll’s lawsuit merely “articulated his ideological objections” to the existence of OHA,¹⁷ and in the case of Barrett, the court found, among other things, that Barrett did not have standing to challenge OHA’s business loan program since he had no real

¹³ Carroll v. Nakatani, 188 F. Supp.2d 1233, 2002 U.S. Dist. LEXIS 3455 (D. Haw. 2002) [hereinafter Carroll]. Article XII, sections 5 and 6 of the Hawai‘i Constitution (added by the Constitutional Convention of 1978 and ratified by general election on Nov. 7, 1978) established the Office of Hawaiian Affairs and its Board of Trustees “elected by qualified voters who are Hawaiians, as provided by law.” Thus, it is important to note that the 1978 creation of OHA and its voting restriction was ratified by all of Hawai‘i’s registered voters, not just Native Hawaiians.

The *Barrett* and *Carroll* cases were consolidated on December 15, 2000. *Carroll*, at 1234 fn.1.

¹⁴ *Carroll*, 188 F. Supp.2d at 1236-37; *Barrett*, 188 F. Supp.2d at 1226, 1232-33.

¹⁵ *Carroll*, 188 F. Supp.2d at 1236.

¹⁶ *Barrett*, 188 F. Supp.2d at 1224, 1232. In fact, Barrett first “applied” for an OHA loan on October 19, 2000, sixteen days after he filed his complaint in federal court alleging “discrimination” in OHA’s treatment of his application!

¹⁷ *Carroll*, 188 F. Supp.2d at 1239.

stake in the litigation “beyond his philosophical position.”¹⁸

Thus, the Ezra findings made obvious that these suits were not about Hawai‘i at all. In fact, these findings confirm that the *Barrett* and *Carroll* lawsuits were not motivated by any particularized concern for Hawai‘i, or its people, or even to redress any real harm to any of its citizens. These lawsuits were simply the application of a generalized right-wing ideology about the nature of race relations to the circumstances of Hawai‘i.

Shortly after the *Barrett* and *Carroll* dismissals, yet another case was filed contesting the constitutionality of OHA, the HHC, and the Department of Hawaiian Homelands (“DHHL”) by a group of “taxpaying citizens” of Hawai‘i, including the wife of John Carroll, the original plaintiff in the *Carroll* lawsuit.¹⁹ Mindful of the lack of standing that had been fatal in the previous cases, but unable to articulate any real individual harm, the new plaintiffs alleged that the harm caused by the defendants was related to the plaintiffs’ burden “as taxpayers.” With this articulation of their standing, these new plaintiffs again have signaled that their motivation to contest the “racial discrimination” alleged to be at the heart of these programs for Native Hawaiians is primarily a vehicle of conservative political and philosophical agenda.²⁰

In the absence of any Supreme Court concern for the nuances of colonialism or racism, these progeny of the *Rice* case eschew any attempt to be consistent with the historic racial grievances of people of color who were and are personally assaulted, injured, and prejudiced by racial hierarchy, or even address the unique historical circumstances of Hawai‘i. The *Rice* decision instead encourages the articulation of a formulaic right-wing mantra and agenda under the disguise of lofty and empty constitutional rhetoric.²¹

¹⁸ *Barrett*, 188 F. Supp.2d at 1226.

¹⁹ *Arakaki v. Cayetano*, Civ. No. CV02-00139 (SOM) (filed D. Haw. March 4, 2002).

²⁰ *Id.* Complaint for Declaratory Judgment (Re: Constitutionality of Office of Hawaiian Affairs, Hawaiian Homes Commission and Related Laws) and for an Injunction at pp. 25-29 (on file with author).

²¹ Although in its decision denying the Arakaki plaintiffs’ petition for a Temporary Restraining Order to prevent HHC, DHL, and OHA from either receiving or disbursing any funds, assets, or leases, the court (Judge Susan Oki Mollway) found taxpayer standing limited to claims asserting Fourteenth Amendment violations, the court nevertheless found that “with respect to the narrow claims for which Plaintiffs have standing, Plaintiffs fail to demonstrate

Indeed, *Rice*'s moral vacuity may be best observed in the permission it gives to equate "burdened taxpayers" to the cruel legacy of racial supremacy, colonial domination, cultural devastation, and vast political, social, and economic disparity in Hawai'i. This moral bankruptcy of the *Arakaki* plaintiffs' stance is best illustrated by the dissent in *Hoohuli v. Ariyoshi*, a 1984 case in which non-Hawaiians sought to obtain an injunction preventing state tax monies being used for the "class identified as 'Hawaiians.'":²²

The non-Hawaiian plaintiffs in no way allege how operation of the benefits plan . . . increases any tax they do pay. They have shown no logical connection between such an increase in their own tax liability and the unreasonable definition [of "Hawaiian"] the statute purportedly embodies To the extent they merely, without more, list amounts of tax money that Hawaii will spend, and assert they have been burdened with a "necessity" to provide more taxes, the non-Hawaiians failed to show they have more than a minute claim.²³

Rice thus has reinvigorated another assault on Hawaiian justice claims and allowed a progeny in which an unproven and probably "minute" individual tax burden now has equal legal currency to the ravages of the inhumanity of slavery, the shame of Native American genocide, the legacy of Jim Crow, the injustice of Japanese American internment, the illegal overthrow of the Hawaiian Kingdom, and centuries of brutal inequity throughout the nation's history.

But it is not only in the continuation of the sanitization and ultimate obliteration of our nation's racial and colonial history that *Rice*

any possibility that they will be harmed during the time period for which this court may issue a temporary restraining order." *Arakaki v. Cayetano*, 2002 U.S. Dist. LEXIS 7010 (D. Haw. March 18, 2002) at *16 (emphasis added).

²² *Hoohuli v. Ariyoshi*, 741 F.2d 1169, at 1180 (9th Cir. 1984). The majority found that individual non-Hawaiian taxpayers had standing to challenge the "appropriating, transferring, and spending . . . of taxpayers' money from the General Fund of the State Treasury." *Id.* However, there is uncertainty whether *Hoohuli* requires that a taxpayer has standing only when challenging the spending of money from a state's General Fund. See *Arakaki*, *supra* note 19, at n.9.

²³ *Id.* at 1183 (Wallace, J., dissenting) (emphasis original) (citation omitted). Judge Wallace concludes, like Judge Ezra after him: "Federal courts are not for the airing of 'generalized complaints about the way in which government goes about its business.'" *Id.*

leaves its mark. Ironically, in post 9/11 America, the ideology of “colorblindness” illustrated in *Rice* and which has proven so useful to keep people of color from progressing has also now come in conflict with the racial profiling that “homeland security” apparently demands.

In post 9/11 America, a new brand of “Americanism” has emerged that contains a worldview encompassing the permission, indeed the mandate, to “see color” at airports and in airplanes or in national security-related employment, yet “see no color” when justice claims of people of color threaten racial privilege, or when indigenous people seek to proclaim their sovereignty. It is a worldview that condemns Palestinian suicide bombs as terrorism, but sees civilian killings by the Israeli army in refugee camps as legitimate armed incursion. It sees terrorism in the awful loss of civilian life in the World Trade Center, but sees the loss of civilian life in Afghanistan as merely “collateral damage.” Perhaps *Rice*’s ultimate meaning is in its illustration once again²⁴ that underneath the Supreme Court’s rhetoric, masquerading as “neutral” decision-making, the highest echelons of power will not see the nuances of similarity and difference to fashion a more equitable society – but only act upon and encourage a worldview of privilege, self-interest, and domination.

²⁴

There are many historical illustrations of how courts legitimize subordination. See e.g., *Plessy v. Ferguson*, 163 U.S. 537 (1896) (upholding racial segregation); *Korematsu v. United States*, 323 U.S. 214 (1944) (upholding the mass internment of Japanese American citizens). The use of “national security” rationales to justify racial subordination, as in *Korematsu*, is reminiscent of present-day events, post 9/11. The use of Hawai’i as the center for the Pacific Fleet greatly impacts Hawaiian sovereignty claims and issues. For example, shortly after 9/11, the longstanding controversy over the use of Makua Valley, sacred to Hawaiians, as a live ammunition firing range for the military, was quickly settled as “national security” became a much more potent bargaining chip for the government.